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IN THE

Supreme Court of the United States

October Term, 1959

No. 408

PENNSYLVANIA PUBLIC UTILITY COMMISSION,

Petitioner

v.

UNITED STATES OF AMERICA

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF PENNSYLVANIA

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PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF PENNSYLVANIA

To the Honorable, the Chief Justice and the Associate Justices of the Supreme Court of the United States:

The petitioner, Pennsylvania Public Utility Commission, respectfully prays that a writ of certiorari issue to review the judgment of the Supreme Court of Pennsylvania entered in the above-entitled case on June 30, 1958. Said judgment has reversed the judgment of the Superior Court of Pennsylvania, which had affirmed orders of the Commission.

A. OPINIONS BELOW

The opinion delivered by the Supreme Court of Pennsylvania, to which certiorari is sought, is reported at 393 Pa. 537, 143 A. 2d 341, and is appended hereto as Appendix A, pp. 25-32. The opinion delivered by the Superior Court of Pennsylvania was entered September 30, 1957, is reported at 184 Pa. Superior Ct. 380, 135 A. 2d 93, and is appended hereto as Appendix B. pp. 33-48. The orders of your petitioner, Pennsylvania Public Utility Commission, were entered on June 15, 1954, and on July 2, 1956, and are appended hereto as Appendix C, pp. 49-53, and Appendix D, pp. 54-57, respectively. The first of these orders is reported at 32 Pa. P.U.C. 428; the second is unreported.

B. STATEMENT OF GROUNDS ON WHICH THIS COURT'S JURISDICTION IS INVOKED

I. The judgment of the Supreme Court of Pennsylvania sought to be reviewed is dated June 30, 1958, and was entered on that date.

II. There has been no order by the Supreme Court of Pennsylvania respecting a rehearing, or extending the time within which to petition for certiorari.

III. Jurisdiction to review the judgment by writ of certiorari is conferred on this Court by §1257(3) of the Judicial Code, 28 U.S.C.A. §1257(3). The Supreme Court of Pennsylvania is the highest court of the Commonwealth of Pennsylvania.

C. QUESTION PRESENTED

Is an order of the Pennsylvania Public Utility Commission, issued after notice and hearing under the State Public Utility Law, requiring only that a rail carrier "cease and desist [intra-state] transportation of property for the Federal Government, or its agencies, at the rates other than provided in [the carrier's] tariffs filed with the Commission", an unconstitutional restraint or control on federal transportation procurement under the decision of this Court in *Public Utilities Commission of California v. United States*, 355 U. S. 534, 78 S. Ct. 446, 2 L. Ed. 2d 470 (1958)? (The case last cited will at times hereafter be referred to as "the California case.")

D. CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

I. The Constitutional provision involved is the supremacy clause of the Constitution of the United States, Article VI, Clause 2:

> "This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any thing in the Constitution or Laws of any State to the Contrary Notwithstanding."

II. The statute involved is the Pennsylvania Public Utility Law of May 28, 1937, P. L. 1053, 66 P.S. §1101 et seq. The portions of said statute here involved are §§302, 303, 304, and 308, 66 P.S. §§1142, 1143, 1144, 1148. These sections are set out in Appendix E, pp. 58-61.

III. Rules 2 and 6 of your petitioner's tariff regulations for carriers are involved herein, and are attached hereto as Appendix F, pp. 62-65. By reason of the nature of the question presented, certain regulations of the United States Army, Navy, and Air Force, cited in this Court's opinion in *Public Utilities Commission of California v. United States*, 355 U. S. 534, 542, 78 S. Ct. 446, 452, 2 L. Ed. 2d 470, 476, are also involved (Armed Forces Procurement Regulations, 32 C.F.R., 1957 Supp., §1.108 et seq., §1.306-10; Army Regulation 55-142, Paragraph 2, dated August 19, 1956; Navy Shipping Guide, Part I, Art. 1800 (d) (3) (20)). Since these regulations are not part of the record in the instant case they are not set out by way of appendix.

E. STATEMENT OF THE CASE

On November 16, 1953, on the basis of information in its possession concerning rail shipments from Olmsted Air Force Base, Middletown, Pennsylvania, to Marietta Transportation Corps Depot, York, Pennsylvania, the Commission instituted an inquiry and investigation against The Pennsylvania Railroad Company to determine whether the railroad was transporting property for Federal agencies without charge or at rates other than those provided in the railroad's tariffs filed with the Commission. The United States, acting through the Secretary of the Army and the Army Judge Advocate General, intervened in the proceedings before the Commission. A hearing was held on March 22, 1954, and evidence presented by The Pennsylvania Railroad Company. On June 15, 1954, after receiving briefs, the Commission entered an order which found "that transportation service in Pennsylvania is provided by [the railroad] at rates other than those contained in [its] interstate tariffs", and which directed the railroad to cease and desist from such transportation at rates other than therein provided (*Investigation Docket 24*, 32 Pa. P.U.C. 428). The United States thereafter petitioned the Commission for a rehearing and for reconsideration of its order. The Commission denied this petition on August 10, 1954. On September 10, 1954, the United States appealed the Commission's order to the Superior Court of Pennsylvania, challenging the

applicability to it, and, if applicable, the constitutionality of Sections 302, 303, 304, and 308 of the Pennsylvania Public Utility Law, 66 P.S. §§1142, 1143, 1148.

Subsequently, on petition of the United States acting through the Attorney General, the Superior Court remanded the record to the Commission for further study and consideration, for supplementation of the record, and to enable the Commission to make such further findings as were just and proper. Pursuant to the order of remand, the Commission held a further hearing on December 8, 1955, at which time the United States adduced testimony by various officers and representatives of the Army, Navy, and Air Force. Subsequently, on July 2, 1956, the Commission entered a second order affirming its prior findings and order, and returning the record to the Superior Court.

On September 30, 1957, after briefs and argument, the Superior Court entered a judgment and opinion holding (1) that the challenged provisions of the Pennsylvania Public Utility Law were applicable to the intrastate transportation of property for the United States, (2) that no substantial burden on the United States, or interference therewith, was created by said application, and (3) that, as so construed, these provisions of the state law were constitutional (*United States of America v. Penna. P.U.C.*, 184 Pa. Superior Ct. 380, 135 A. 2d 93). In reaching this decision, the Superior Court considered, inter alia, the judgment and opinion of the three-judge District Court in *United States v. Public Utilities Commission of California*, entered April 30, 1956, at 141 F. Supp. 168. In its opinion the Superior Court noted the pendency in this Court of the appeal from the decision

of the California District Court allowed at 352 U. S. 924, 77 S. Ct. 221, 1 L. Ed. 2d 159. This Court's judgment and opinion in that appeal was not entered until March 3, 1958, in *Public Utilities Commission of California v. United States*, supra, 355 U. S. 534, 78 S. Ct. 446, 2 L. Ed. 470.

Subsequent to the Superior Court's decision, the United States petitioned the Supreme Court of Pennsylvania for allowance of an appeal. The court dismissed the petition per curiam on February 11, 1958. Thereafter, on March 10, 1958, the United States petitioned the Pennsylvania Supreme Court for reconsideration of its February 11 order, citing this Court's decision of March 3 in the California case, supra. On March 11 the Supreme Court of Pennsylvania vacated its order disallowing an appeal, and directed that the matter

> "be submitted to [the Supreme] Court . . . as to the scope and effect of the decision of the Supreme Court of the United States in *Public Utilities Commission of California v. United States of America*, handed down March 3, 1958."

On June 30, 1958, following briefs and argument, the Supreme Court of Pennsylvania entered the judgment and opinion from which review is sought (*United States of America v. Penna. P.U.C.*, 393 Pa. 537, 143 A. 2d 341). The court in said opinion found it "unnecessary" to decide whether the aforesaid sections of the Pennsylvania Public Utility Law were applicable to the United States, preferring to rest its decision on "the broader ground" set forth by this Court in *Public Utilities Commission of California v. United*

States, supra, 355 U. S. 534, 78 S. Ct. 446, 2 L. Ed. 2d 470. Holding that case controlling, the Supreme Court of Pennsylvania found Sections 303 and 304 of the Pennsylvania Public Utility Law to be unconstitutional insofar as they apply to the intrastate transportation of property for the United States.

On August 29, 1958, on petition of the Commission, the Pennsylvania Supreme Court entered an order staying the enforcement of its judgment of June 30, 1958, until September 30, 1958, and for such time thereafter as will be required for this Court to consider and to dispose of the instant petition for certiorari.

F. THE STAGES AND MANNER IN WHICH THE FEDERAL QUESTIONS HAVE BEEN RAISED

The questions of (1) whether Sections 302, 303, 304 and 308 of the Pennsylvania Public Utility Law are applicable to intrastate transportation of property for the United States, and (2) whether, if applicable, they are constitutional, were first raised by the United States, acting through the Secretary of the Army, in its March, 1954 petition to the Commission to intervene in the Commission proceedings, which questioned the jurisdiction of the Commission to regulate the transportation in question. The Commission's first order of June 15, 1954, 32 Pa. P.U.C. 428, resolved against the United States its claim that its shipments were exempt from regulation under the state law. The Commission's second order of July 2, 1956, affirmed that position.

The petition in appeal filed by the United States, acting through the Attorney General, in the Superior Court of Pennsylvania, assigned as error the Commission's determination that transportation for the United States was not exempt from regulation under Sections 302, 303, 304, and 308. The petition also alleged that if the statute were not construed as exempting such transportation, it must be held unconstitutional under the supremacy clause of the United States Constitution, Article VI, Clause 2. Both of these contentions were resolved against the United States by the Superior Court of Pennsylvania.

The United States' petition to the Supreme Court of Pennsylvania for the allowance of an appeal from the judgment of the Superior Court raised both of the questions raised in, and passed on by the Superior Court. As already stated, the Supreme Court found it unnecessary to decide the question of whether the statute was applicable to transportation of property for the United States, and rested its decision on the constitutional ground set forth by this Court in *Public Utilities Commission of California v. United States*, 355 U. S. 534, 78 S. Ct. 446, 2 L. Ed. 2d 470.

G. REASONS RELIED ON FOR THE ALLOWANCE OF THE WRIT

Your petitioner respectfully submits the following reasons for its belief that the Supreme Court of Pennsylvania has decided a federal question of substance in a way not in accord with the applicable decisions of this Court, and that certiorari should therefore be granted:

1. In the instant case, unlike the California case, there is no element of state administrative discretion to which the United States is obliged to bow.

The Commission's orders have not, as this Court found in the California case, "subjected [the United States] to the discretionary authority of a state agency for the terms on which, by grace [the United States] can make arrangements for services to be rendered it." (355 U. S. 534, 539, 78 S. Ct. 446, 450, 2 L. Ed. 2d 470, 475). All that your petitioner's orders have required is that The Pennsylvania Railroad Company comply with the provisions of its filed tariffs with respect to shipments for the United States, in the same manner as it must comply with respect to shipments for other consignors or customers. In the words of President Judge Rhodes of the Superior Court of Pennsylvania:

> "The United States relies to some extent upon United States v. Public Utilities Commission of California, 141 F. Supp. 168, which held the Public Utility Code of California unconstitutional

in so far as it 'purports to authorize the Public Utilities Commission of California to impose "such conditions as it may consider just and reasonable" upon the granting of reduced rates by commercial carriers in favor of the [United States],' * * *,' 141 F. Supp. 168, 190. The California Code is different from our law which does not permit such free or reduced rates. Our Law requires that the officially filed tariffs be complied with regardless of the shipper. The order of the commission in the present case is merely that The Pennsylvania Railroad Company comply with the established tariffs. The order does not purport to impose any further regulation or condition upon the shipment of property for the Federal Government or subject it, its officers, or agents to any regulation as might be possible under the California Code. Under our law the Federal Government is to be treated as any other customer." (184 Pa. Super. Ct. 380, 394, 135 A. 2d 93, 100)

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2. In the instant case the impact of state regulation falls not on the United States but on the carrier.

In this case the impact of state regulation falls on the carrier, The Pennsylvania Railroad Company, in the first instance, and for all practical purposes remains where it falls. The mandate of Sections 302, 303, 304, and 308 of the Pennsylvania Public Utility Law is directed solely to those public utilities, including carriers, which come within the control and purview of that statute. Consignors, including the United States, are free to make arrangements for

transportation needed by them without reference to, or control by, the provisions of that law. *This freedom includes the freedom to negotiate for special rates.* There is no situation at bar like that in the California case, where the District Court found that if an officer of the United States were to negotiate with a carrier for reduced or special rates, "he could be thrown into the county jail" (141 F. Supp. 168, 186, quoted by this Court at 355 U.S. 538, 78 S. Ct. 450, 2 L. Ed. 2d 474).

Your petitioner submits that this issue was correctly held by the Pennsylvania Superior Court to be controlled by *Penn Dairies v. Milk Control Commission*, 318 U.S. 261, 63 S. Ct. 617, 87 L. Ed. 748, 1942, where this Honorable Court held:

> "Here the state regulation imposes no prohibition on the national government or its officers. They may purchase milk from whom and at what price they will, without incurring any penalty. . . . As in the case of state taxation of the seller, the government is affected only as the state's regulation may increase the price which the government must pay for milk. By the exercise of control over the seller, the regulation imposes or may impose an increased economic burden on the government, for it may be assumed that the regulation if enforcible and enforced will increase the price of milk purchased for consumption in Pennsylvania, unless the government is able to procure a supply from without the state. . . . But in this burden, if Congress has not acted to forbid it, we can find no different or greater impairment of federal authority than in the tax on sales to a government contractor sustained in Alabama v.

King & Boozer, supra; or the state regulation of the operations of a trucking company in performing its contract with the government to transport workers employed on a Public Works Administration project, upheld in Baltimore & Annapolis R. Co. v. Lichtenberg, supra; or the local building regulations applied to a contractor engaged in constructing a postoffice building for the government, sustained in Stewart & Co. v. Sadrakula, 309 U.S. 94."

Moreover, throughout these proceedings the government has failed to show that it has encountered any difficulties by reason of the existence of the state regulation of which it complains.

The order of the Pennsylvania Public Utility Commission, dated June 15, 1954, in its inquiry and investigation against The Pennsylvania Railroad Company, directed that this carrier cease and desist transportation of government shipments at rates other than provided in its tariffs. Thereafter, the United States of America appealed, and subsequently, before argument, petitioned the Superior Court to remand the record to the Commission in order that the record might be supplemented by a complete exposition of the Army's practices and problems in the transportation filed. Hearing upon the remand proceeding was held on December 8, 1955. Despite this additional opportunity there is not one iota of evidence that the government, or for that matter the railroad, has been handicapped by the Commission order. It is a matter of record that the impact of the Commission's order has been "slight." The government's concern has resolved into one of fear as to what *might* happen in *other* states

under other circumstances as a result of the Commission order.

The United States has also contended that state regulation in this case may impair or prejudice national security, relying on the finding in this regard by the District Court in the California case. It would appear that this Court was not impressed by that argument, as its decision in that appeal was manifestly based upon the form of the California statute—the provisions of the law that subject government shipments to regulation "by grace" of the California Commission—the provisions of the law that require specific approval of the rates—and the inability of a carrier under the statute to establish a "freight all kinds" rate. As a practical matter, President Judge Rhodes of the Pennsylvania Superior Court aptly stated with respect to security shipments:

> "In such instances the Federal Government would not be obliged to reveal to the commission any more information than it would ordinarily reveal to the carrier which is to transport the property. The regulation of rates for carriage does not require any breach of security or the extended dissemination of information which might lead to a breach of security."

In any event, it is apparent that security shipments were not a matter of consideration in the decision of the United States Supreme Court and cannot be regarded as controlling that decision. Furthermore, on this record and up to this time these considerations have not presented a problem to the Pennsylvania Commission in its administration of the law.

To the extent that the California District Court, as affirmed by this Court, rested its decision on the indefinite delays of Government shipments which were possible under, and inherent in, the California statute and its method of enforcement, the instant situation is also distinguishable. Under that statute there was an inherent and imminent possibility of prolonged delays, indefinite in duration, before approval by the state administrative agency of a proposed rate. No such possibility exists under the Pennsylvania statute. Under that law and your petitioner's regulations a carrier may place rates into effect on thirty days' notice or, for cause shown, without such notice.

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3. A mere filing will effect full compliance with your petitioner's orders.

Contrary to the assumption of the Pennsylvania Supreme Court that the effect of your petitioner's orders has been to require the discontinuance of a special or reduced rate, the record affirmatively shows that such rates are not in issue. The carrier in the instant situation will place itself in a position of full compliance with the Commission's orders by the mere filing of the requisite tariffs.

The Commission's order of June 15, 1954, directed the carrier to "cease and desist [intrastate] transportation of property for the Federal Government, or its agencies, at . . . rates other than provided in [the carrier's] tariffs filed with the Commission." The Pennsylvania Railroad Company need only file such rates as it has agreed upon with the United States, for those rates, and transportation thereunder, to

become lawful. In Pennsylvania utility rates, including those of common carriers, are established by the utility in the first instance; they remain such unless affirmative action is taken by the Commission to change them (Public Utility Law, §302, 66 P.S. §1142; *Coplay Cement Corporation v. Pennsylvania Public Service Commission*, 271 Pa. 58, 114 A. 649, 1921). There has been no showing that the filing of these tariffs would burden the carrier in the slightest, even less than such filing would burden the United States. On the other hand, these filings are necessary prerequisites to the proper administration of the rate provisions of the Public Utility Law. They are vital to an informed Commission, as well as to the transportation industry itself, in considering the transportation requirements of the nation's single largest consignor.

In this most material respect the instant case differs sharply from the California case, where the District Court found, and this Court affirmed, that serious problems in the administration and classification of the government's procurement program, would result where state regulation held constitutional. These problems clearly appear as the rationale of this Court's decision in that case. No such problems exist in the case at bar.

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4. The decision of the Pennsylvania Supreme Court, if allowed to stand, will violate both state and national transportation policy.

The United States' challenge to state regulation in this case seeks to preserve for itself all the benefits of state regulation as applied to others, while carving

out an area of special and unreasonable immunity as applied to its own shipments. Thus, the United States does not challenge any aspect of the statutory regulatory scheme other than the rate provisions. In fact the United States stated in its original brief filed in the Superior Court that "* * * it should be borne in mind that in arranging for transportation of property of the government the responsible officers assiduously follow the established policy of dealing only with common carriers completely qualified under the local laws. Thus, in Pennsylvania, the Government would never engage a carrier which is not certificated and registered as required and had not met all the requirements with respect to safety and insurance and other matters designed to protect the highways and the interests of the citizens of the state."

Absent any regulatory jurisdiction over rates, it is difficult to imagine what assurance this Commission can give the United States Government that the service of common carriers in Pennsylvania will at all times be adequate, efficient, safe, and reasonable, when, obviously, the rate provisions of the statute are necessary incidents of the regulatory scheme and the declared policy of the Pennsylvania Legislature to foster sound economic conditions, to promote safe, adequate, economical, and efficient service, and just and reasonable rates, without unjust discrimination, and unfair destructive practices in the transportation field (Section 801 of the Pennsylvania Public Utility Law). The deficiency indeed has now been recognized by Congress in its recent enactment amending Section 22 of the Interstate Commerce Act. Furthermore, by the Act of September 18, 1940, c. 772, Title I, section 1,

51 Stat. 899 (49 U.S.C.A. 1), Congress, speaking of the Interstate Commerce Act said:

> "It is hereby declared to be the national transportation policy of the Congress to provide for fair and impartial regulation of all modes of transportation subject to the provisions of this Act, so administered as to recognize and preserve the inherent advantages of each; to promote, safe, adequate, economical, and efficient service and foster sound economic conditions in transportation and among the several carriers; to encourage the establishment and maintenance of reasonable charges for transportation services, without unjust discriminations, undue preferences or advantages, or unfair or destructive competitive practices; to cooperate with the several States and the duly authorized officials thereof; and to encourage fair wages and equitable working conditions;—all to the end of developing, coordinating, and preserving a national transportation system by water, highway, and rail, as well as other means, adequate, to meet the needs of the commerce of the United States, of the Postal Service, and of the national defense. All of the provisions of this Act shall be administered and enforced with a view to carrying out the above declaration of policy." (Emphasis supplied.)

Therefore, under the national transportation policy the national defense is a part of the regulatory scheme, in which the states have an indispensable role.

It should also be noted that the transportation of property for the United States Government, or its

agencies, also had the consideration of the Interstate Commerce Commission, in *Ex Parte* 192, 299 I.C.C. , a part of the record in this case, and is now beyond any doubt subject to Section 22 of the Interstate Commerce Act, as amended 49 U.S.C. §22, and the regulations recently promulgated by the Interstate Commerce Commission at Ex Parte 211, appended hereto as Appendix G. Under the decision of this Court in the California case there is no indication that the Court intended that the standards or policies of federal transportation procurement supplant the Interstate Commerce Act any more than the various state statutes which subject the shipments of property of the United States to regulation.

Summary

In sum, your petitioner believes that its order of June 15, 1954, as sustained in its order of July 2, 1956, is not unconstitutional, since (1) it does not subject the United States to the discretion of a state administrative agency, (2) its impact is not on the United States, (3) its impact on the carrier is minimal, and (4) it conforms with the regulatory schemes of both the national government and the Commonwealth of Pennsylvania.

This Court in innumerable cases dealing with the supremacy of the federal government within its allotted field, has held that the police power of the several states may not be exercised to impose unreasonable burdens upon the federal government or its

instrumentalities, or to control, or interfere with, the performance of its functions; Article VI of the Constitution of the United States; *McCulloch v. Maryland*, 4 Wheat. 316. Mr. Chief Justice Hughes has aptly said the question of interference with the government is one of reasonableness and degree: *Metcalf v. Mitchell*, 269 U.S. 514, 46 S. Ct. 172, 70 L. Ed. 384 (1925).

Your petitioner does not, certainly, dispute the above principles. Petitioner does believe that there is no inconsistency between this Court's decision holding the California statute unconstitutional and the decision of the Pennsylvania Superior Court holding the Pennsylvania statute constitutional. It is believed that the Pennsylvania Supreme Court has erred in reversing the Superior Court on the sole basis of this Court's decision in the California case, without considering the marked distinctions which are above discussed.

Moreover, the decision of the Supreme Court of Pennsylvania leaves unsettled a host of questions as to the scope of its decision. For example, it is unclear whether the decision abrogates your petitioner's power to regulate the intrastate transportation by common carrier of all government-owned property, or whether it applies only to property consigned by one of the government's military departments or agencies. It is not clear whether the decision affects property consigned to, but not owned by, the United States. It is not clear whether the carrier may not voluntarily file a tariff applicable to government consignments and thereafter enforce it against the government.

CONCLUSION

The judgment of the Supreme Court of Pennsylvania is erroneous and injects uncertainty into the regulatory system of the Pennsylvania Public Utility Commission established by the Pennsylvania Public Utility Law. This petition for a writ of certiorari should therefore be granted.

Respectfully submitted.

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APPENDIX A

IN THE SUPREME COURT
OF PENNSYLVANIA

Eastern District

No. 253 January Term, 1958

United States of America

v.

The Pennsylvania Public Utility Commission

Appeal from the Judgment of the Superior Court of Pennsylvania at No. 27 October Term, 1955 affirming the Orders of the Pennsylvania Public Utility Commission at Investigation Docket No. 24.

OPINION OF THE COURT

Bell, J. Filed: June 30, 1958

This is an appeal by the United States from a unanimous opinion by the Superior Court affirming an Order of the Pennsylvania Public Utility Commission enjoining the Pennsylvania Railroad from charging the Federal Government railroad rates other than

those filed in its tariffs with the Public Utility Commission.

The facts are these: In the Fall of 1953 the Pennsylvania Railroad quoted a *special* rate to the United States for the carriage of certain Air Force material from the Marietta Air Force Station in Pennsylvania to a commercial warehouse at Columbia, Pa., for storage. The material consisted of parachutes, engine parts, life rafts and similar equipment. *The special rate was lower than the regular tariff rate* published by the Railroad for commercial shipments of a similar nature. The Pennsylvania Public Utility Commission after investigation and hearings determined that the Railroad was transporting or offering to transport property for Federal Agencies in violation of §§303 and 304 of the Public Utility Law of Pennsylvania (Act of May 28, 1937, P.L. 1053, as amended, 66 PS 1142, 1143). Briefly stated, these two sections prohibit the carrier from carrying property for "any person, corporation or municipal corporation" at a rate less than the rates contained in tariffs published and filed with the Commission, or granting any such "person, corporation or municipal corporation" an unreasonable preference or advantage. The Railroad and the Government of the United States denied any violation of the Public Utility Law in quoting these lower rates to the United States. The Superior Court affirmed the Commission's action.

We shall summarize and briefly discuss the important contentions made by each party. The United States contends that it is not included within the def-

inition of "person, corporation or municipal corporation", as employed in §§303 and 304 or elsewhere in the Act* and consequently they do not apply to or include the Federal Government, either generally or under the theories of ejusdem generis and expressio unis. It is unnecessary to decide this question since we prefer to place our decision upon the broader ground hereinafter discussed.

The Superior Court analyzed the relevant portions of the statute and concluded that the comprehensive language used throughout the Act, especially in those sections relating to service, rates and tariffs, none of which excluded the United States, demonstrated that §§303 and 304 were not intended to restrict the jurisdiction of the Commission so as to exclude regulation of rates charged the United States. The Superior Court also stated (a) that a partial or fractional regulation of carriers varying on the basis of the nature of the shipper as compared to the nature of the shipment, was not intended by the Legislature, and (b) that this was especially true in light of the fact that the Public Utility Law prohibits unreasonable discrimination among shippers unless the inequality of charges or facilities is justified by a difference in circumstances or situation. The fact that the Government is the customer has been held not to be such a material difference: *United States v. Oklahoma Gas and Electric Co.*, 297 Fed. 575.

* The Government points out that such special arrangements were tacitly appro[illegible] the Commission until 1952 when they were questioned for the first time.

Most important, the United States contends that the Public Utility Law if applied to the United States —even in intrastate commerce—would impose an unreasonable burden and an unreasonable delay on the discharge of certain of its Constitutional functions, i.e., supplying the Armed Forces and other related defense functions. The Public Utility Law imposes a duty on the carrier but does not impose any duty on the United States or its officers with respect to compliance therewith. The Superior Court believed, contrary to the Government's contention, that the United States would not be required to divulge classified or security information as a result of the carrier's compliance with the Act. That Court mainly relied on *Penn Dairies, Inc. v. Milk Control Commission of Pennsylvania*, 318 U. S. 261, 274, 275. In that case, which involved the Pennsylvania Milk Control Law, a renewal of the license of a milk dealer was refused by the Milk Control Commission because the dealer, in violation of the state law, had sold milk to the United States at prices below the minima fixed by the Commission. The sales and deliveries were made within the State, under a contract awarded the dealer, as the lowest bidder, for supply milk for consumption by troops at an Army camp established by the United States, on land belonging to the State, under a permit which involved no surrender of the State's jurisdiction or authority over the area. The Supreme Court held that in these circumstances, an application of the state law to the dealer was not precluded by the Constitution or laws of the United States. However, after the decision of the Superior

Court was filed, the *Penn Dairies* case was distinguished in *P. U. C. of California v. United States of America*, (decided on March 3, 1958), and this recent case controls the instant case.

In *P. U. C. of California v. United States of America*, Justice Douglas, speaking for a majority of the Court, said:

"Section 530 of the California Public Utilities Code, Cal. Stat. 1955, c. 1966, provides in part: 'Every common carrier subject to the provisions of this part may transport, free or at reduced rates: (a) Persons for the United States, ... The commission may permit common carriers to transport property at reduced rates for the United States, state, county, or municipal governments, to such extent and subject to such conditions as it may consider just and reasonable. . . .'

"There is a large volume of military traffic between points in California. For many years the United States has negotiated special agreements with carriers as to the rates governing the transportation of government property. Property for the armed services has usually been transported at negotiated rates substantially equal to or lower than those applicable to regular commercial shipments.

"The United States filed this suit for declaratory relief, 28 U.S.C. §2201, in a three-judge District Court, asking that §530 be declared unconstitutional insofar as it prohibits carriers from transporting government property at rates other than those approved by the Commission and requesting relief by injunction.

"The District Court rendered judgment for the United States, 141 F. Supp. 168. . . .

". . . §486 requires common carriers to file their rates with the Commission. Section 493 provides that no common carrier shall engage in transportation until its schedules of rates have been filed. Section 494 provides that no common carrier 'shall charge, demand, collect, or receive a different compensation for the transportation of persons or property . . . than the applicable rates . . . specified in its schedules filed . . . .' . . .

"The Commission has plainly indicated an intent to enforce the Act; and prohibition of the statute is so broad as to deny the United States the right to ship at reduced rates, unless the Commission first gives its approval.

". . .

". . . The question is whether the United States can be subjected to the discretionary authority of a state agency for the terms on which, by grace, it can make arrangements for services to be rendered it. . . .

"Assuming, arguendo, that the Act [Johnson Act, 62 Stat. 932] applies to the sovereign who made it, there is no violation of its mandate in the relief granted here. In the present case, the challenge is not to a rate 'order' but to a statute which requires the United States to submit its negotiated rates to the California Commission for approval. The United States wants to be rid of the system that subjects its procurement services to that form of state supervision.

"We come to the merits. Congress has provided a comprehensive policy governing procurement. 10 U.S.C. §§2301-2314. While competitive bidding is the general policy, §2304 provides that 'the head of an agency may negotiate such a purchase or contract, if . . . (2) the public exigency will not permit the delay incident to advertising; . . . (10) the purchase or contract is for property or services for which it is impracticable to obtain competition; . . . (12) the purchase or contract is for property or services whose procurement he determines should not be publicly disclosed because of their character, ingredients, or components; . . . .'

"The regulations, promulgated to carry out these statutory provisions, are numerous and extensive. . . .

"It seems clear that these regulations—which have the force of law, Leslie Miller, Inc. v. Arkansas, 352 U. S. 187; Standard Oil Co. v. Johnson, 316 U. S. 481—sanction the policy of negotiating rates for shipment of federal property and entrust the procurement officers with the discretion to determine when existing rates will be accepted and when negotiation for lower rates will be undertaken. It also seems clear that under §530 of the California Public Utilities Code this discretion of the federal officers may be exercised and reduced rates used only if the Commission approves. The question is whether California may impose this restraint or control on federal transportation procurement.

". . . Penn Dairies v. Milk Control Comm'n, 318 U. S. 261, can likewise be put to one side. There the

question, much mooted, was whether the federal policy conflicted with the state policy fixing the price of milk which the United States purchased. The Court concluded that the state regulation 'imposes no prohibition on the national government or its officers.' Id., at 270. . . . Here the conflict between the federal policy of negotiated rates and the state policy of regulation of negotiated rates seems to us to be clear.'"*

"Moreover, no rates exist for much of the military traffic, which means that, unless the United States can negotiate rates for each shipment, the shipments would be delayed for Commission action unless shipped under the established rates which are higher than negotiated rates. . . . Affirmed."

The judgment of the Superior Court is reversed.

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* In a dissenting opinion by Mr. Justice Harlan, in which the Chief Justice and Mr. Justice Burton joined, it is said: "In Penn Dairies, the Court upheld a Pennsylvania law setting minimum prices for milk as applied to a dealer selling milk in Pennsylvania to the United States for consumption at military camps. I can see no constitutional distinction between state regulation of the price of milk the Government must buy and of the price at which the Government must ship the milk it has bought."

APPENDIX B

OPINION OF THE SUPERIOR COURT OF PENNSYLVANIA

Opinion by Rhodes, P. J., September 30, 1957:

The basic issue in this appeal is whether the Pennsylvania Public Utility Commission may lawfully regulate rates charged by a common carrier on wholly intrastate shipments of property of the United States of America.

On November 1953, the commission, on its own motion, instituted an inquiry and investigation for the purpose of determining whether the Pennsylvania Railroad Company was transporting property free or at reduced rates for federal agencies or at charges other than is provided in its officially filed tariffs in violation of sections 303 and 304 of the Public Utility Law of May 28, 1937, P. L. 1053, 66 PS §§1143, 1144. The company filed an answer admitting that it offered to transport property for the United States at rates other than those published in its tariffs, but denying the violation of sections 303 and 304 of the Law. An initial hearing was held on March 22, 1954. The commission granted the petition of the United States to intervene. On June 15, 1954, the commission entered an order in which it found: "In the absence of express statutory authority to the contrary, transportation of property for State or Federal Government is within

the scope of the [Public Utility] law." Accordingly, the commission ordered: "That The Pennsylvania Railroad Company cease and desist transportation of property for the Federal Government, or its agencies, at rates other than provided in its tariffs filed with the Commission." A petition of the United States for rehearing was refused. The United States appealed to this Court, and upon petition we remanded the record to the commission for further study and consideration, for supplementation of the record, to make specific findings of fact in detail, and to enter such an order as may be deemed just and proper in the premises. At the remand hearing the United States presented evidence of its practices and problems in the transportation field as it relates to the matter of regulation of the common carriers used. On July 2, 1956, the commission affirmed its order of June 15, 1954, asserting its jurisdiction over the matter and enjoining the railroad from charging rates other than those in its tariffs filed with the commission. The matter is now before us on appeal of the United States.

Appellant presents two questions for our consideration: "1. Does the Public Utility Law of Pennsylvania prohibit carriers from transporting property of the United States between points in the state at rates other than those contained in published tariffs? 2. Is a state statute which confers upon a state Commission the power to regulate the rates for the shipment of the property of the United States between points in the state unconstitutional?"

We observe that these questions are similar to those which were before us in *Penn Dairies, Inc. v. Milk*

Control Commission of Pennsylvania, 148 Pa. Superior Ct. 261, 24 A. 2d 717, wherein we held that the sale of milk to the United States was subject to the minimum price fixed by the Milk Control Commission, and that such regulation was not unconstitutional. Our decision in the *Penn Dairies* case was affirmed on appeal to the Pennsylvania Supreme Court (344 Pa. 635, 26 A. 2d 431) and by the United States Supreme Court (318 U. S. 261, 63 S. Ct. 617, 87 L. Ed. 748).[1] It is our opinion that the principles applied in the *Penn Dairies* case are generally applicable to this case.

The initial inquiry is whether our Public Utility Law prohibits a carrier from charging rates other than those in its officially-filed tariffs for the transportation of property of the United States. Section 303 of the Law, 66 PS §1143, relates to compliance with such filed tariffs and provides: "No public utility shall, directly or indirectly, by any device whatsoever, or in anywise, demand or receive from any person, corporation, or municipal corporation a greater or less rate for any service rendered or to be rendered by such public utility than that specified in the tariffs of such public utility applicable thereto then filed in the manner provided in this act. The rates specified in such tariffs shall be the lawful rates of such public utility until changed, as provided in this act: . . ." It is argued on behalf of the United States that section 303 does not apply to shipments of the

[1] The United States Supreme Court assumed the applicability of the Milk Control Act to sales to the United States and discussed only the constitutional issue.

United States because it simply prohibits a utility from demanding or receiving a greater or lesser rate "from any person, corporation, or municipal corporation," and does not specifically mention other governmental bodies such as the United States. We may assume for present purposes that the three categories mentioned in section 303 do not include the United States as they have been defined in the law.[2] It is our conclusion, however, that the Legislature did not intend to exclude shipments of the Federal Government by the mention of the three categories in section 303. The doctrine that the inclusion of certain classes infers the exclusion of others is an aid which may be used to ascertain the legislative intent; but it is not of universal application and it may not be applied

[2] Section 2 of the Law, 66 PS §1102, defines the three categories as follows:

"(9) 'Corporation' means all bodies corporate, joint-stock companies, or associations, domestic or foreign, their lessees, assignees, trustees, receivers, or other successors in interest, having any of the powers or privileges of corporations not possessed by individuals or partnerships, but shall not include municipal corporations, except as otherwise expressly provided in this act, nor bona fide cooperative associations which furnish service on a nonprofit basis only to their stockholders or members. . . .

"(15) 'Municipal Corporation' means all cities, boroughs, towns, townships, or counties of this Commonwealth, and also any public corporation, authority, or body whatsoever created or organized under any law of this Commonwealth for the purpose of rendering any service similar to that of a public utility.

"(16) 'Person' means individuals, partnerships, or associations, other than corporations, and includes their lessees, assignees, trustees, receivers, executors, administrators, or other successors in interest."

where it would defeat the apparent intention of the Legislature. *Fazio v. Pittsburgh Railways Company*, 321 Pa. 7, 11, 12, 182 A. 696. The maxim does not apply where an examination of the entire statute indicates a more inclusive application than may appear from the reading of one section thereof. See *Fazio Unemployment Compensation Case*, 164 Pa. Superior Ct. 9, 11, 12, 63 A. 2d 489. We said in *Penn Dairies, Inc. v. Milk Control Commission of Pennsylvania*, supra, 148 Pa. Superior Ct. 261, 266, 24 A. 2d 717, 719, that to arrive at the real meaning of an act it is necessary to take a broad general view of it so as to obtain an exact conception of its purpose, scope, and object. See, also, *Rose Township v. Hollobaugh*, 179 Pa. Superior Ct. 284, 291, 116 A. 2d 323; *Swartley v. Harris*, 351 Pa. 116, 119, 40 A. 2d 409. The Public Utility Law is comprehensive, and an analysis of the relevant sections clearly indicates the legislative intent. The Pennsylvania Railroad Company is a carrier within the meaning of the Law. Section 2 (5), 66 PS §1102 (5). Furnishing transportation for property of the United States is a "service" which requires a certificate of approval from the commission.[3] Sections 201 (b), 202 (c), 66 PS §§1121 (b), 1122 (c). The rates which are required by the Law to be just and reasonable (section 301, 66 PS §1141) and which are subject to regulation by the commission are defined as those "made, demanded, or received for any service within this act, offered, ren-

[3] "Service" is used in the Law "in its broadest and most inclusive sense." Section 2 (20), 66 PS §1102 (20).

See, also, section 2 (23), 66 PS §1102 (23), which defines "Transportation of Passengers or Property."

dered, or furnished by such public utility, ..." Section 2 (19), 66 PS §1102 (19). The utility is required to file with the commission its "tariff showing all rates established by it and collected or enforced, or to be collected or enforced, within the jurisdiction of the commission."[4] Section 302, 66 PS §1142. Before a utility may charge rates other than those in its officially filed tariffs, it must file such changes with the commission. Section 308, 66 PS §1148. Our examination of the Law in the foregoing respects indicates that the service furnished by The Pennsylvania Railroad Company to the United States was service within the meaning of the Law and that the rates charged therefor were required to be filed with the commission. There is no exception applicable to the United States indicated in any of the sections; on the contrary they are all-inclusive. We think it would be unreasonable to say that, after setting forth these essential requirements, the Legislature intended to permit a noncompliance with the established tariffs merely because the United States is not specifically enumerated in section 303. The comprehensive language used throughout the Law, especially in those sections relating to service, rates, and tariffs, amply demonstrates that section 303 was not intended to restrict the jurisdiction of the commission so as to exclude regulation of rates charged the United States.

The failure to mention the sovereign in section 303 does not exclude such service and rates. We recog

[4] The filing of rates is of compelling importance to effective regulation. United States v. Illinois Terminal Railroad Company, 168 F. 546, 549.

nize it is ordinarily presumed that statutes affect only private rights and do not embrace rights of the sovereign unless the latter is explicitly designated or clearly intended. *Commonwealth v. Pennsylvania, State Employes' Retirement System v. Dauphin County*, 353 Pa. 177, 180, 181, 6 A. 2d 879. But where the statute is an expression of public policy the sovereign is not to be excluded unless the intention to exclude it is clearly made to appear.[1] *Pittsburgh Public Parking Authority Petition*, 366 Pa. 10, 13, 14, 76 A. 2d 629. Our Public Utility Law was enacted in the interest of state-wide public welfare (*Duquesne Light Company v. Upper St. Clair Township*, 377 Pa. 322, 336, 105 A. 2d 287; *Postal Telegraph-Cable Company v. Pennsylvania Public Utility Commission*, 154 Pa. Superior Ct. 340, 345, 346, 35 A. 2d 535), and its primary object is to serve the general public (*Boston Taxi Company v. Pennsylvania Public Utility Commission*, 164 Pa. Superior Ct. 13, 18, 63 A. 2d 424). The Law provides for utility regulation in order to insure adequate service for the public at reasonable rates, and to prevent unlawful discrimination such as the granting of a preferential rate to some at the expense of other users of the same utility service. It does not clearly appear that it was the intention of the Legislature to exclude service provided for the

[1] "The intention to interfere with the state function of regulating intrastate rates is not to be presumed." Arkansas Railroad Commission v. Chicago, Rock Island, and Pacific Railroad Company, 274 U. S. 597, 603, 47 S. Ct. 724; 71 L. Ed. 1224, 1228.

[2] See section 801, 66 PS §1301, which is a declaration of policy concerning common carriers by motor vehicle.

United States and rates charged therefor from regulation; in fact, we are convinced that the Law as a whole, its purpose, scope, and policy clearly reveal that it was intended to include all such service and rates. *United States v. Cooper Corporation*, 312 U. S. 600, 604, 61 S. Ct. 742, 85 L. Ed. 1071, 1074. See *United States v. Oklahoma Gas & Electric Co.*, 297 F. 575, 579, which upheld the regulation of rates for electricity supplied to the Government. The alleged long continued practice of noninterference by the commission in cases of special carrier contracts for the United States, if material at all, does not outweigh the fundamental purpose underlying the enactment of the Law in order to maintain an efficient, economical transportation system for the public at rates which are reasonable and nondiscriminatory. See *State College Borough Authority v. Pennsylvania Public Utility Commission*, 152 Pa. Superior Ct. 363, 372, 31 A. 2d 557.

The United States also contends that the reference to the three categories of customers in section 303 limits its application under the doctrine of "ejusdem generis." This rule is only an aid to construction: "'. . . it is never applied to defeat the real purpose of the statute, as that purpose may be gathered from the whole instrument.'" *United States v. Metcalf*, 215 U. S. 26, 31, 30 S. Ct. 19, 54 L. Ed. 77, 79. See, also, *Com. v. Klucher*, 326 Pa. 587, 590, 193 A. 28.

We may not be unmindful that the regulation under the Law is that of The Pennsylvania Railroad Company, a common carrier. If it is permitted to use its equipment for intrastate carriage of property of

the United States without being subject to regulation, it will be using equipment that otherwise would be used for carriage of property for ordinary patrons but charging rates other than those paid by such patrons.[7] See sections 401, 403, 66 PS §§1171, 1173. The utility is not permitted to establish or maintain any unreasonable difference as to rates. Section 304, 66 PS §1444. The strong public policy against unreasonable discrimination is firmly established in this Commonwealth not only by the Public Utility Law but by the Pennsylvania Constitution as well. Const. Art. 17, §3, as amended November 7, 1933, Const. PS.[8] Undue or unreasonable discrimination results if customers are treated differently although the services to be performed and the conditions under which those services are performed are alike in all material respects. *Hoover v. Pennsylvania Railroad Co.*, 156 Pa. 220, 229, 27 A. 282; *Paine & Co. v. The Pennsylvania Railroad Co.*, 14 Pa. C.C. 38, 45. Any inequality of charges or facilities must be justified by a difference of circumstances and situations. *Wright v. Baltimore & Ohio Railroad*, 32 Pa. Superior Ct. 5, 10. The fact that the Government is the customer is not such a material difference. *United States v. Oklahoma Gas & Electric Co.*, supra, 297 F. 575, 579. The difference must relate to the shipment not to the shipper. One of the shipments involved in the present case consist-

[7] A public utility performs a function of the state (Smyth v. Ames, 169 U. S. 466, 544; 18 S. Ct. 418, 42 L. Ed. 819, 848); and it must use all its receipts as though they were a public trust (City of Fort Smith v. Southwestern Bell Telephone Company, 247 S.W. 2d 474, 483).

[8] See, also, Art. 17, §§1, 7, Const. PS.

ed of parachutes, engine parts, life rafts, and similar equipment which were to be transported from the United States Air Force Station at Marietta, Pennsylvania, to a commercial warehouse at Columbia, Pennsylvania. There is no reason why the United States should pay a lower proportionate rate than the manufacturer or supplier of these articles when they were originally shipped to Marietta. Such undue or unreasonable discrimination is prohibited. See *United States v. Oklahoma Gas & Electric Co.*, supra, 297 F. 575, 578, 579.

It follows that a partial or fractional regulation of carriers on the basis of the nature of the customer was not intended by the Legislature.

The other matter for consideration is whether the Law is constitutional as applied to rates charged for intrastate shipments of the United States. In *Penn Dairies, Inc. v. Milk Control Commission of Pennsylvania*, supra, 318 U. S. 261, 270, 63 S. Ct. 617, 87 L. Ed. 748, 754, it is stated: "The trend of our decisions is not to extend governmental immunity from state taxation and regulation beyond the national government itself and governmental functions performed by its officers and agents. We have recognized that the Constitution presupposes the continued existence of the states functioning in co-ordination with the national government, with authority in the states to lay taxes and to regulate their internal affairs and policy, and that state regulation like state taxation inevitably imposes some burdens on the national government of the same kind as those imposed on citizens of the United States within the state's borders, . . . And we

have held that those burdens, save as Congress may act to remove them, are to be regarded as the normal incidents of the operation within the same territory of a dual system of government, and that no immunity of the national government from such burdens is to be implied from the Constitution which established the system, . . .'' It is apparent that, whatever the immunity of the Federal Government may be, such immunity does not extend to those who render services to the Government such as The Pennsylvania Railroad Company. *Penn Dairies, Inc. v. Milk Control Commission of Pennsylvania*, supra, 318 U. S. 261, 269, 63 S. Ct. 617, 87 L. Ed. 748, 753. The mere fact that there may be an increased economic burden imposed by requiring The Pennsylvania Railroad Company to comply with its established tariffs in performing services for the Unted States is not a valid basis for bringing the railroad company within any implied governmental immunity. *Penn Dairies, Inc. v. Milk Control Commission of Pennsylvania*, supra. 318 U. S. 261, 269, 63 S. Ct. 617, 87 L. Ed. 748, 753; *Alabama v. King & Boozer*, 314 U. S. 1, 9, 62 S. Ct. 43, 86 L. Ed. 3, 6.

The United States contends, however, that the particular nature of this transportation indicates that state regulation of the rate imposes an unreasonable burden upon the Federal Government. It is argued that the lines of supply of the United States are highly integrated and synchronized to operate on a world-wide basis, and that any local interference with that system is improper. In the present case we are concerned only with shipments which originate and ter-

minate within the Commonwealth of Pennsylvania without crossing state lines. It is purely an intrastate transportation. When considered in the over-all governmental picture, it may have some relationship to the world-wide and national programs, but this fact alone does not make the obligation to pay established rates for transportation an unreasonable burden. Obviously, in the *Penn Dairies* case the supply of milk to the armed forces in training was part of the program of building and maintaining a healthy and effective fighting force during the Second World War. Nevertheless the requirement that the minimum price be paid for such milk when purchased in Pennsylvania did not impose an unconstitutional burden. We find no material difference between the *Penn Dairies* case and the present one in this respect.

It is also clear that the Law does not impose any duty or burden to compliance therewith. The duty and the regulation are imposed upon the carrier which provides the transportation and charges the rate therefor. Compliance with the Law by the carrier in no way increases the responsibility of government officers or agents, and does not require any additional effort on their part in procuring transportation.

Counsel for the United States also agrees that, because of the variety of commodities shipped by the military forces, there may not be an established tariff on file for certain items, and that this would result in a delay of the shipment while such tariffs are being filed and approved. We believe that the commission adequately answers this practical problem, if it is one, by referring to its regulations which would per-

mit the railroad company to file a tariff covering such shipments and obtain concurrent commission approval. See, also, sections 302, 308 (a), 66 PS §§1142, 1148, which authorize the commission to expedite the filing and the approval of any new or changed rate. A witness for the United States in fact testified that there was no delay caused by such procedure. In this connection the United States also contends that, since certain shipments of military material may be of a secret nature, the requirement of filing rates for shipment thereof with the commission may require revealing the nature of the shipment or its secret destination. In such instances the Federal Government would not be obliged to reveal to the commission any more information than it would ordinarily reveal to the carrier which is to transport the property. The regulation of rates for carriage does not require any breach of security or the extended dissemination of information which might lead to a breach of security.

It is further contended that the state regulation of rates conflicts with a specific congressional policy that all government shipments be made by special arrangement free from regulation. This purported congressional policy is apparently based upon the general government requirement of competitive bidding and upon section 22 of the Interstate Commerce Act, 49 U.S.C.A. 22, which permits interstate governmental shipments free or at reduced rates. The policy in favor of competitive bidding is not so strong as to prevent local regulation of rates. In *Penn Dairies, Inc. v. Milk Control Commission of Pennsylvania*, supra, 318 U. S. 261, 274, 275, 63 S. Ct. 617, 87 L. Ed. 748,

756, as to a similar contention, it was said: "Evidence is wanting that Congress, in authorizing competitive bidding, has been so concerned with securing the lowest possible price for articles furnished to the government that it wished to set aside all local regulations affecting price. . . . An unexpressed purpose of Congress to set aside statutes of the states regulating their internal affairs is not lightly to be inferred and ought not to be implied where the legislative command, read in the light of its history, remains ambiguous." Moreover, the fact that section 22 of the Interstate Commerce Act, 49 U.S.C.A. 22, permits interstate shipments for the Federal Government to be handled free or at reduced rates does not indicate a congressional policy that intrastate shipments with respect to rates be free of local regulation. Section 22 recognizes that shipments for the Federal Government may be made subject to certain regulation without placing any undue burden upon the Government. See *Nashville, Chattanooga & St. Louis Railway v. Tennessee*, 262 U. S. 318, 43 S. Ct. 583, 67 L. Ed. 999.

The United States relies to some extent upon *United States v. Public Utilities Commission of California*, 141 F. Supp. 168, which held the Public Utility Code of California unconstitutional in so far as it "purports to authorize the Public Utilities Commission of California to impose 'such conditions as it may consider just and reasonable' upon the granting of reduced rates by commercial carriers in favor of the [United States], . . ." 141 F. Supp. 168, 190. The California Code is different from our Law which does not permit such free or reduced rates. Our Law re-

quires that the officially filed tariffs be complied with regardless of the shipper. The order of the commission in the present case is merely that The Pennsylvania Railroad Company comply with the established tariffs. The order does not purport to impose any further regulation or condition upon the shipment of property for the Federal Government or subject it, its officers, or agents to any regulation as might be possible under the California Code. Under our Law the Federal Government is to be treated as any other customer. The California Code may be too broad with respect to the imposition of conditions and regulation of government shipments in a manner different from ordinary customers. Moreover, we are not in complete accord with the reasoning in *United States v. Public Utilities Commission of California*, supra, 141 F. Supp. 168. That decision does not in any way control the determination of the present appeal or announce principles which would be presently applicable.[9]

Admittedly, the use of intrastate carriers and utilities by the Federal Government is substantial. It must be recognized, however, that the commission could not adequately regulate such carriers and utilities if the business of the Federal Government were exempt from commission regulation. Our Public Law was intended to apply generally. In view of the lack of any substantial burden upon the United States or interference therewith, we conclude that the provisions of the Law relating to the power to regulate

[9] There has been no disposition of the appeal pending in the United States Supreme Court, No. 117, October Term, 1956.

intrastate rates are constitutional, and that the commission had jurisdiction to enter the order requiring The Pennsylvania Railroad Company to comply with its established tariffs in the absence of express authority to the contrary.

The orders are affirmed.

APPENDIX C

PENNSYLVANIA PUBLIC UTILITY COMMISSION

Investigation Docket No. 24

In re: Inquiry and Investigation upon Commission motion into the rates and charges of The Pennsylvania Railroad Company for transportation of property for the Federal Government or its agencies.

ORDER

By the Commission, June 15, 1954:

On November 16, 1953, we instituted an inquiry and investigation to determine whether The Pennsylvania Railroad Company is transporting or holding out and offering to transport property for Federal agencies in violation of sections 308 and or 304 of the Public Utility Law, Act of May 28, 1937, P. L. 1053, as amended. In response to our order dated November 16, 1953, The Pennsylvania Railroad Company admitted that it has offered to transport property for the United States at rates not published in its tariffs; it denied the violation of sections 303 and 304 of the

Public Utility Law. Hearing in the matter was held on March 22, 1954. The Secretary of the Army, on behalf of the United States, intervened in support of The Pennsylvania Railroad Company. Briefs were filed on behalf of the railroad company on April 22, 1954, and by the Secretary of the Army on behalf of the United States on April 23, 1954.

The record establishes that transportation service in Pennsylvania is provided by The Pennsylvania Railroad Company for the United States at rates other than those contained in the intrastate tariffs of the respondent railroad company. The facts of the case are not disputed, but it is on these facts that the contentions have been made (1) that this Commission is without jurisdiction to determine the validity of rates for transportation of property for the Federal government between points in Pennsylvania; and (2) that intrastate freight rates lower than and different from the published tariffs may be accorded by a carrier to the United States Government without violating sections 303 or 304 of the Pennsylvania Public Utility Law.

Transportation of property between points in Pennsylvania is a matter within the purview of the Pennsylvania Utility Law, Act of May 28, 1937, P. L. 1053, as amended. The statutory definition of common carrier includes any person or corporation holding out, offering, or undertaking, directly or indirectly, transportation of property for compensation; the statute also required that a common carrier file tariffs showing all rates established by it and collected or enforced or to be collected or enforced: Sections

2(5) and 302 of the Public Utility Law. There is no exemption for transportation of property for State or Federal government or its agencies, under the statutory definition of common carrier or under the definition of the term "transportation of persons or property": Sections 2(5) and 2(23) of the Public Utility Law. The Pennsylvania Commission here is not seeking to enforce upon the government, but upon a common carrier, otherwise subject to its jurisdiction, a statewide regulation enacted by the legislature in the public interest. It is our opinion that The Pennsylvania Railroad cannot be relieved of its obligation to comply with the law merely because a government agency is the shipper.

Our investigation here related to violations of sections 303 and 304 of the Public Utility Law, supra. These sections provide:

> "Section 303. Adherence to Tariffs.—No public utility shall, directly or indirectly, by any device whatsoever, or in anywise, demand or receive from any person, corporation, or municipal corporation a greater or less rate for any service rendered or to be rendered by such public utility than that specified in the tariffs of such public utility applicable thereto then filed in the manner provided in this act. The rates specified in such tariffs shall be the lawful rates of such public utility until changed, as provided in this act: . . ."
>
> "Section 304. Discrimination in Rates.—No public utility shall, as to rates, make or grant any

> unreasonable preference or advantage to any person, corporation, or municipal corporation, or subject any person, corporation, or municipal corporation to any unreasonable prejudice or disadvantage. . . ."

The contention is made that the terms "person," "corporation," or "municipal corporation" as contained in these sections do not include the Federal government and that these sections of the law, therefore, do not apply. It may be true that the terms "person," "corporation," or "municipal corporation" ordinarily do not include the Federal government. On the other hand, Section 303 further requires that the rates specified in tariffs shall be the lawful rates of the utility and Section 304 provides that no public utility shall, as to rates, subject any "person," "corporation," or "municipal corporation" to any unreasonable prejudice or disadvantage. The full context of sections 303 and 304 does not support an interpretation of the law exempting this class of transportation.

As we said initially transportation of property between points in Pennsylvania is a matter within the purview of the Public Utility Law. In the absence of express statutory authority to the contrary, transportation of property for State or Federal Government is within the scope of the law. It is our conclusion that under the law there is no exemption of transportation for the Federal Government, or its agencies; that it is unlawful for a carrier to transport for the Government at rates other than contained in its published tariffs. To do so constitutes a violation of sections

303 and 304 of our Public Utility Law: THEREFORE,

IT IS ORDERED: That The Pennsylvania Railroad Company cease and desist transportation of property for the Federal Government, or its agencies, at rates other than provided in its tariffs filed with the Commission.

Pennsylvania Public Utility Commission
(signed) Leon Schwartz
Chairman

Attest:

Acting Secretary

Commissioner Houck voted in the negative.

APPENDIX D

PENNSYLVANIA PUBLIC UTILITY COMMISSION

Investigation Docket No. 24

In re: Inquiry and investigation upon Commission motion into the rates and charges of The Pennsylvania Railroad Company for transportation of property for the Federal Government or its agencies.

ORDER

By the Commission, July 2, 1956:

On August 13, 1955, the Superior Court of Pennsylvania, upon consideration of a petition filed on behalf of the United States of America, remanded the record and proceedings in United States of America v. Pa. P.U.C. No. 27 October Term, 1955, to us for further study and consideration, for supplementation of the record and to enter such an order, in lieu of our prior order of June 15, 1954, as may be deemed just and proper in the premises.

The matter before us originated in our inquiry and investigation instituted on November 16, 1953, at In-

vestigation Docket No. 24, to determine whether The Pennsylania Railroad Company was transporting or holding out and offering to transport property for Federal agencies in violation of Sections 303 and or 304 of the Pa. P.U.L., Act of May 28, 1937, P. L. 1053, as amended.

Hearing upon the original inquiry and investigation was held on March 22, 1954. Following this hearing we entered an order of June 15, 1954. As set forth therein the facts of the case were not disputed. The record established that transportation service in Pennsylvania was provided by The Pennsylvania Railroad Company for the United States at rates other than those contained in the intrastate tariffs of the railroad company. The Pennsylania Railroad Company and the Secretary of the Army on behalf of the United States contended (1) that this Commission is without jurisdiction to determine the validity of rates for transportation of property for the Federal Government between points in Pennsylvania; and (2) that intrastate freight rates lower than and different from the published tariffs may be accorded by a carrier to the United States Government without violating Sections 303 or 304 of the Pennsylvania Public Utility Law. We said that the transportation of property between points in Pennsylania is a matter within the purview of the Public Utility Law, and in the absence of express statutory authority to the contrary, transportation of property for State or Federal Government is within the scope of the law. We concluded that there is no exemption of transportation for the Federal Government, or its agencies, and that

it is unlawful for a carrier to transport for the government at rates other than contained in its published tariffs. We, therefore, ordered that The Pennsylvania Railroad Company cease and desist transportation of property for the Federal Government, or its agencies, at rates other than provided in its tariffs filed with the Commission. From this order an appeal was taken by the United States of America.

Thereafter, before argument, the United States of America petitioned the Superior Court to remand the record to the Commission in order that the record might be supplemented. This petition was not opposed by the Commission and on August 3, 1958, it was granted by the court.

Hearing upon the original inquiry and investigation contained only the testimony given by an official of the Pennsylvania Railroad Company. Hearing upon the remand proceeding was held on December 8, 1955, and the record is now supplemented by a complete exposition of the Army's practices and problems in the transportation field.

We have examined all of the evidence submitted by the Army and see no reason to alter the conclusion we have already reached under our prior order of June 15, 1954; THEREFORE,

IT IS ORDERED:

1. That in all respects our order, dated June 15, 1954, shall remain in full force and effect.

2. That the record forthwith be returned to the Superior Court in the matter of the Inquiry and In-

vestigation against The Pennsylvania Railroad Company at Investigation Docket No. 24.

Pennsylvania Public Utility Commission
(signed) Leon Schwartz
Chairman

Attest:

Secretary

APPENDIX E

STATUTE INVOLVED—PUBLIC UTILITY LAW

Section 302 (66 P.S. §1142). **Tariffs; Filing and Inspection.**—Under such regulations as the commission may prescribe, every public utility shall file with the commission, within such time and in such form as the commission may designate, tariffs showing all rates established by it and collected or enforced, or to be collected or enforced, within the jurisdiction of the commission. The tariffs of any public utility also subject to the jurisdiction of a Federal regulatory body shall correspond, so far as practicable, to the form of those prescribed by such Federal regulatory body. Every public utility shall keep copies of such tariffs open to public inspection under such rules and regulations as the commission may prescribe.

Section 303 (66 P.S. §1143). **Adherence to Tariffs.**—No public utility shall, directly or indirectly, by any device whatsoever, or in anywise, demand or receive from any person, corporation, or municipal corporation a greater or less rate for any service rendered or to be rendered by such public utility than that specified in the tariffs of such public utility applicable thereto then filed in the manner provided in this act. The rates specified in such tariffs shall be the lawful rates of such public utility until changed, as provided in this act: Provided, That any public utility, having

more than one rate applicable to service rendered to a patron, shall, after notice of service conditions, compute bills under the rate most advantageous to the patron.

Section 304 (66 P.S. §1144). **Discrimination in Rates.**—No public utility shall, as to rates, make or grant any unreasonable preference or advantage, to any person, corporation or municipal corporation, or subject any person, corporation, or municipal corporation to any unreasonable prejudice or disadvantage. No public utility shall establish or maintain any unreasonable difference as to rates, either as between localities or as between classes of service. Unless specifically authorized by the commission, no public utility shall make, demand, or receive any greater rate in the aggregate for the transportation of passengers or property of the same class, or for the transmission of any message or conversation for a shorter than for a longer distance over the same line or route in the same direction, the shorter being included within the longer distance, or any greater rate as a through rate than the aggregate of the intermediate rates. Nothing herein contained shall be deemed to prohibit the establishment of reasonable zone or group systems, or classifications of rates or, in the case of common carriers, the issuance of excursion, commutation or other special tickets at special rates, or the granting of non-transferable free passes, or passes at a discount to any officer, employe, or pensioner of such common carrier. No rate charged by a municipality for any public utility service rendered or furnished beyond its corporate limits shall be considered unjustly discriminatory solely by reason of the fact that a differ-

ent rate is charged for a similar service within its corporate limits.

Section 308 (66 P.S. §1148). **Voluntary Changes in Rates.**—(a) Unless the commission otherwise orders, no public utility shall make any change in any existing and duly established rate, except after sixty days' notice to the commission, which notice shall plainly state the changes proposed to be made in the rates then in force, and the time when the changed rates will go into effect. The public utility shall also give such notice of the proposed changes to other interested persons as the commission in its discretion may direct. All proposed changes shall be shown by filing new tariffs or supplements to existing tariff filed and in force at the time. The commission, for good cause shown, may allow changes in rates, without requiring the sixty days' notice, under such conditions as it may prescribe.

(b) Whenever there is filed with the commission by any public utility any tariff stating a new rate, the commission may, either upon complaint or upon its own motion, upon reasonable notice, enter upon a hearing concerning the lawfulness of such rate, and pending such hearing and the decision thereon, the commission, upon filing with such tariff and delivering to the public utility affected thereby a statement in writing of its reasons therefor, may, at any time before it becomes effective, suspend the operation of such rate for a period not longer than six months from the time such rate would otherwise become effective, and an additional period of not more than three months pending such decision. The rate in force when

the tariff stating the new rate was filed shall continue in force during the period of suspension, unless the commission shall establish a temporary rate as authorized in section three hundred ten of this act. The commission shall consider the effect of such suspension in finally determining and prescribing the rates to be thereafter charged and collected by such public utility.

(c) If, after such hearing, the commission finds any such rate to be unjust or unreasonable, or in anywise in violation of law, the commission shall determine the just and reasonable rate to be charged or applied by the public utility for the service in question, and shall fix the same by order to be served upon the public utility; and such rate shall thereafter be observed until changed as provided by this act.

APPENDIX F

REGULATIONS OF PENNSYLVANIA PUBLIC UTILITY COMMISSION

RULE 2—PUBLIC NOTICE OF TARIFF CHANGES

(a) Section 308 (a) of the Public Utility Law provides in part as follows:

> "* * * Unless the commission otherwise orders, no public utility shall make any change in any existing rate, except after sixty days' notice to the commission, * * * The commission, for good cause shown, may allow changes in rates, without requiring the sixty days' notice, under such conditions as it may prescribe."

The Interstate Commerce Commission permits the filing of changes in tariffs of common carriers upon 30 days' notice. Many common carriers subject to the jurisdiction of the Pennsylvania Public Utility Commission are also subject to the jurisdiction of the Interstate Commerce Commission, and it is therefore apparent that a substantial conflict in requirements such as is inherent in Section 308 (a) of the Public Utility Law and the Interstate Commerce Commission Regulations referred to above, could cause great confusion and create undesirable conditions. Therefore, in order to establish uniformity so far as practicable in the rules, regulations and practice of common carriers subject both to the jurisdiction of the Interstate

Commerce Commission and of this Commission and so that common carriers subject to the exclusive jurisdiction of this Commission may not be unreasonably prejudiced or burdened, all common carriers are, unless otherwise directed, hereby permitted to file changes in existing and duly established rates upon 30 days' notice to the Commission and the public.

(b) Except by specific authority of this Commission, no change shall be made in any existing and duly established rate unless said rate has been in operation and effect for at least 30 days. This limitation will not, however, apply to tariffs or schedules containing rates for excursions limited to certain designated periods under authority of Paragraph (d) hereof.

(c) On newly constructed lines of road and upon the inauguration of newly certified service, rates and fares may be established in the first instance by posting tariffs or supplements and filing the same with the Commission one day in advance of the effective date. Such tariffs or supplements shall not propose changes in existing rates, fares or regulations and shall refer to this rule, immediately below the effective date, as follows:

> "Issued under authority of Tariff Rule 2 (c) of Pennsylvania Public Utility Commission."

Tariffs or supplements issued by other carriers establishing rates or fares in connection with such extended service may be issued only upon thirty (30) days' notice or under special permission for shorter time. It will be the Commission's policy to grant such reasonable permissions as are necessary to give carriers and shippers efficient use of such new facilities.

RULE 6—FILING OF TARIFFS OR SUPPLEMENTS ON LESS THAN THIRTY (30) DAYS' NOTICE

(a) No carrier shall file any tariff or supplement on less than thirty (30) days' notice, unless it shall have first received special permission of the Commission to do so.

(b) Applications for authority to file tariffs or supplements on less than the prescribed notice shall be made in duplicate under oath by a responsible officer of the applicant in the form shown below.

(c) Short notice authority will be granted only in cases where actual emergency and real merit are shown. Desire to meet the rates of a competing carrier that have been established in the regular manner will not of itself be considered as sufficient cause for permitting changes in rates or other provisions without observance of the usual filing period.

(This form to be printed or typewritten on paper 8 x 10½ inches in size)

.....

(Name of petitioning company)

..... 194

(Place and date)

To: PENNSYLVANIA PUBLIC UTILITY COMMISSION, HARRISBURG, PENNA.

The .....

(Name of petitioning company)

does respectfully petition the Commission that it be permitted under Article III, Section 308 of the Public Utility Law to put in force the following rates, to become effective day(s) after the filing thereof with the Commission.

(State fully the rates it is desired to put into effect, the article upon which they are to apply, and the points affected.)

. . . . . .

. . . . . .

Your petitioner further represents that the said rates above mentioned will be published in Tariff Pa. P.U.C. No. or in Supplement No. to Tariff Pa. P.U.C. No. , and will supersede and take the place of the rates on like tariff from and to the points above named which are set forth in Tariff Pa. P.U.C. No. or Supplement No. to Tariff Pa. P.U.C. No. on file with the Commission.

And your petitioner further bases such request upon the following facts, which present certain special circumstances and conditions justifying the request herein made:

(State fully all the circumstances and conditions which are relied upon as justifying the application, and if based upon rates in effect via other lines, specific reference shall be given to the Pa. P.U.C. numbers of the tariffs of such other line or lines.)

. . . . . .

. . . . . .

(Name of petitioning company)

By

(Name of officer; personal signature)

(Title of officer)

(Affidavit)

APPENDIX G

REGULATIONS OF INTERSTATE COMMERCE COMMISSION

TITLE 49—TRANSPORTATION
CHAPTER I—INTERSTATE COMMERCE COMMISSION
SUBCHAPTER A—GENERAL RULES AND REGULATIONS
PART 149—FILING QUOTATIONS FOR GOVERNMENT SHIPMENTS AT REDUCED RATES

At a General Session of the INTERSTATE COMMERCE COMMISSION, held at its office in Washington, D. C., on the 23rd day of September A. D., 1957

EX PARTE NO. 211

FILING OF QUOTATIONS OR TENDERS OF RATES, FARES OR CHARGES FOR THE TRANSPORTATION, STORAGE, OR HANDLING OF PROPERTY OR THE TRANSPORTATION OF PERSONS FREE OR AT REDUCED RATES FOR THE UNITED STATES GOVERNMENT, OR ANY AGENCY OR DEPARTMENT THEREOF

On August 31, 1957, Section 22 of the Interstate Commerce Act, as amended (49 U.S.C. 22), was further amended by Public Law 85-246 adding a new para-

graph designated (2) which requires common carriers to submit to the Commission concurrently with their submittal to the United States Government agency or department for whose account they are offered, copies of all quotations or tenders of rates, fares or charges for the transportation, storage, or handling of property or the transportation of persons free or at reduced rates for the United States Government, or any agency or department thereof, including quotations or tenders for retroactive application whether negotiated or renegotiated after the services have been performed, except quotations or tenders which, as indicated by the Government or department to any carrier or carriers, involves information the disclosure of which would endanger the national security.

These new statutory requirements became effective immediately upon the signing of the bill by the President on August 31, 1957, the promulgation and establishment of regulations to govern the submission to the Commission of copies of quotations or tenders referred to in the preceding paragraph hereof is of immediate necessity, and for this reason rule-making procedure under Section 4(a) of the Administrative Procedure Act (5 U.S.C. §1003) is deemed impracticable; accordingly

It is ordered, That the following regulations to govern the submission to the Interstate Commerce Commission of quotations or tenders of rates, fares, or charges for the transportation, storage, or handling of property or the transportation of persons free or at reduced rates for the United States Government, or any agency or department thereof, pursuant to the provisions of Section 22 of the Interstate Commerce

Act, as amended (49 U.S.C. 22), be, and they are hereby, approved and prescribed.

Sec.
149.1 Applicability
149.5 Manner of submitting quotations.

AUTHORITY: §§ 149.1 to 149.5 issued under authority sec. 12, 24 Stat. 383, as amended; 49 U.S.C. 12. Interpret or apply sec. 22, 24 Stat. 543, as amended; 49 U.S.C. 22.

§149.1 *Applicability.* The provisions of this Part shall apply to copies of quotations or tenders made by all common carriers by railroad, including express and sleeping-car companies, by pipe-line, by motor vehicle, and by water, and freight forwarders, to the United States Government, or any agency or department thereof, for the transportation, storage or handling of property or the transportation of persons free or at reduced rates as permitted by Section 22 of the Interstate Commerce Act, as amended, except quotations or tenders which, as indicated by the United States Government or any department or agency thereof to any carrier or carriers, involves information the disclosure of which would endanger the national security.

§149.5 *Manner of submitting quotations.* (a) Copies of all quotations or tenders by common carriers to which this part applies, concerning rates, fares, or charges for the transportation, storage, or handling of property or the transportation of persons free or at reduced rates, including quotations or tenders for retroactive application whether negotiated or renegotiated after the services have been performed, which are submitted to the Interstate Commerce Commission

on and after the effective date of this order in conformity with the provisions of paragraph (2) of Section 22 of the Interstate Commerce Act (49 U.S.C. 22) shall conform to the provisions of paragraphs (b), (c), (d), (e), (f) and (g) of this section.

(b) *Copies to be submitted concurrently with submittal to government agencies.* Exact copies of the quotation or tender shall be submitted to the Commission concurrently with the submittal of the quotation or tender to the Federal department or agency for whose account the quotation or tender is offered or the proposed services are to be rendered.

(c) *Filing in duplicate required.* All quotations or tenders shall be filed in duplicate, one copy of which will be maintained at the Washington office of this Commission for public inspection. One of such copies shall be signed and both shall clearly indicate the name and official title of the officer executing the document.

(d) *Filing procedure.* Both copies of the quotations or tenders shall be filed together with a letter of transmittal which clearly indicates that they are being filed in accordance with the requirements of Section 22, as amended. They must be addressed to the "Interstate Commerce Commission, Washington 25, D. C.", with the envelope marked as containing "Section 22 Quotations", and delivered free of all charges. If receipt for the accompanying documents is desired; the letter of transmittal must be sent in duplicate, and one copy showing date of receipt by the Commission will be returned to the sender.

(e) *Numbering.* The copies of quotations or tenders which are filed with this Commission by each carrier

or agent shall be numbered consecutively in a series maintained by such carrier or agent beginning with the number "1".

(f) *Quotation or tender superseding prior one.* A quotation or tender which supersedes a prior quotation or tender shall, by a statement shown immediately under the number of the new document, cancel the prior document by number.

(g) *Amendments or supplements to quotations or tenders.* When amendments or supplements are filed to quotations or tenders issued prior to August 31, 1957, copies of the original quotations or tenders, and any prior amendments thereto, must be filed with the amendments or supplements.

It is further ordered, That this order shall become effective on the 1st day of November, A. D. 1957.

And it is further ordered, That notice of this order shall be given to the common carriers subject to the Interstate Commerce Act by depositing a copy in the office of the Secretary of the Commission at Washington, D. C., and by filing a copy with the Director of the Division of the Federal Register.

By the Commission.

HAROLD D. McCOY,
Secretary.

(SEAL)

VERIFICATION

Commonwealth of Pennsylvania
County of Luzerne ss:

LEON SCHWARTZ, being duly sworn according to law, doth hereby depose and say that he is Chairman of Pennsylvania Public Utility Commission, the petitioner herein, that he is authorized to take this affidavit, and that the facts set forth in the foregoing petition for certiorari addressed to the Supreme Court of the United States are true, complete, and correct to the best of his knowledge, information, and belief.

LEON SCHWARTZ
Leon Schwartz

Sworn to and subscribed before me this 19th day of September, 1958.

Notary Public
Mary C. Doran

Wilkes-Barre,
Luzerne Co., Pa.

My Commission expires Jan. 15, 1959.

(Seal)